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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**BAXTER HEALTHCARE
CORPORATION, et al.,**

8 Plaintiffs, No. C 07-1359 PJH

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10 FRESENIUS MEDICAL CARE
HOLDINGS, INC., et al.,

**ORDER DENYING MOTION FOR
JUDGMENT AS A MATTER OF LAW
AND MOTION FOR A NEW TRIAL**

Defendants.

13 Plaintiffs' motion for judgment as a matter of law and motion for a new trial came on
14 for hearing before this court on November 3, 2010. Plaintiffs appeared by their counsel
15 David Callahan, Aaron Charfoos, and Maureen Toohey, and defendants appeared by their
16 counsel Juanita Brooks and Michael Florey. Having read the parties' papers and carefully
17 considered their arguments and the relevant legal authority, the court hereby DENIES the
18 motions.

BACKGROUND

20 The above-entitled patent infringement action was tried to a jury for ten days in July
21 2010. On July 28, 2010, the jury reached a verdict, finding in favor of defendants
22 Fresenius Medical Care Holdings, Inc., d/b/a Fresenius Medical Care North America, and
23 Fresenius USA, Inc. ("Fresenius"). Judgment was entered on August 13, 2010.

24 Plaintiffs Baxter Healthcare Corporation, Baxter International, Inc., Baxter
25 Healthcare SA, and DEKA Products Limited Partnership (“Baxter/DEKA”) now seek
26 judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b), or, in the
27 alternative, a new trial pursuant to Federal Rule of Civil Procedure 59(a), on the issues of
28 infringement and damages. Fresenius opposes the motions.

DISCUSSION

1 A. Rule 50(b) Renewed Motion for Judgment as a Matter of Law
2 Baxter/DEKA argue that they are entitled to judgment as a matter of law that the
3 Liberty Cycler infringes Claim 12 of the '547 patent; that they are entitled to judgment as a
4 matter of law that the Liberty Cycler infringes Claim 1 of the '823 patent; and that they are
5 entitled to judgment as a matter of law that the Liberty Cycler indirectly infringes Claim 1 of
6 the '823 patent.

7 In patent infringement actions, the Federal Circuit "appl[ies] the standard of review
8 for JMOL rulings used in the relevant circuit." Amgen Inc. v. F. Hoffman-La Roche Ltd.,
9 580 F.3d 1340, 1352 (Fed. Cir. 2009); see also Enovsys LLC v. Nextel Commc'ns, Inc.,
10 614 F.3d 1333, 1341 (Fed. Cir. 2010).

11 A jury verdict "must be upheld if it is supported by substantial evidence . . . even if it
12 is also possible to draw a contrary conclusion." Pavao v. Pagay, 307 F.3d 915, 918 (9th
13 Cir. 2002). The standard for summary judgment "mirrors" that for judgment as a matter of
14 law. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); Anderson v.
15 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The court must review all of the evidence in
16 the record, and draw all reasonable inferences in favor of the nonmoving party. Reeves,
17 530 U.S. at 150; Josephs v. Pac. Bell, 443 F.3d 1050, 1062 (9th Cir. 2006). The court
18 must not make credibility determinations or weigh evidence, as those functions are for the
19 jury. Reeves, 530 U.S. 133 at 150; E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951,
20 961 (9th Cir. 2009).

21 A Rule 50(b) motion "is not a freestanding motion. Rather, it is a renewed Rule
22 50(a) motion." Go Daddy Software, 581 F.3d at 961. If a party makes a Rule 50(a) motion
23 before the case is submitted to the jury, that party may renew its motion under Rule 50(b) if
24 the jury returns a verdict against that party. Id. However, a party cannot raise arguments
25 in a post-trial Rule 50(b) motion that it did not raise in its pre-verdict Rule 50(a) motion. Id.

26 The court finds that judgment as a matter of law is not warranted, and that the
27 evidence may permit more than one reasonable conclusion. Viewing the evidence in the

1 light most favorable to Fresenius, the court cannot say that the jury had no basis for its
2 verdict. Every decision regarding infringement was supported by expert testimony, and the
3 court found the expert testimony to be credible and entitled to weight.

4 First, based on the evidence, the jury could reasonably conclude that the Liberty
5 Cycler's pump does not have either a separate "first chamber wall," or a "vacuum source
6 operable to apply a vacuum between the membrane and the walls," or a "piston head
7 having an external shape substantially similar to a mating internal shape of the first
8 chamber wall," as required by Claim 12 of the '547 patent.

9 Second, based on the evidence, the jury could reasonably conclude that the Liberty
10 Cycler does not "emulat[e] a selected gravity flow condition," as required by Claim 1 of the
11 '823 patent; or that the Liberty does not apply fluid pressure to the diaphragm to operate
12 the pump chamber. Nor does the evidence reflect any divergence from the court's claim
13 construction.

14 In addition, in light of the foregoing, plaintiffs are not entitled to judgment as a matter
15 of law that Fresenius indirectly infringes Claim 1 of the '823 patent.

16 B. Rule 59 Motion for a New Trial

17 Baxter/DEKA argue that they are entitled to a new trial because Fresenius presented
18 legally improper claim construction arguments; because the jury's verdict of
19 noninfringement was against the clear weight of the evidence; and because attorney
20 misconduct, committed by Fresenius lead counsel, permeated the trial and severely
21 prejudiced plaintiffs.

22 A court may grant a new trial "on some or all of the issues" after a jury trial, "for any
23 reason for which a new trial has heretofore been granted in an action at law in federal
24 court." Fed. R. Civ. P. 59(a)(1). Because "Rule 59 does not specify the grounds on which
25 a motion for a new trial may be granted . . . , courts are "bound by those grounds that have
26 been historically recognized. Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1035 (9th
27 Cir. 2003).

28 The Ninth Circuit has held that the grounds on which a new trial may be granted

1 include (1) a verdict that is contrary to the weight of the evidence, (2) a verdict that is based
2 on false or perjurious evidence, or (3) to prevent a miscarriage of justice. Molski v. M.J.
3 Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007) (citation and quotation omitted). The U.S.
4 Supreme Court has also recognized grounds for new trial if “the verdict is against the
5 weight of the evidence, . . . the damages are excessive, or . . . for other reasons, the trial
6 was not fair to the party moving.” Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251
7 (1940); Molski, 481 F.3d at 729. “The existence of substantial evidence does not . . .
8 prevent the court from granting a motion for a new trial pursuant to Fed. R. Civ. P. 59 if the
9 verdict is against the clear weight of the evidence.” Landes Construction Co., Inc. v. Royal
10 Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987).

11 Courts apply a lower standard of proof to motions for a new trial than they do to
12 motions for JMOL. A verdict may be supported by substantial evidence, yet still be against
13 the clear weight of evidence. Molski, 481 F.3d at 729. Unlike a motion for JMOL, in
14 addressing a motion for a new trial, “[t]he judge can weigh the evidence and assess the
15 credibility of witnesses, and need not view the evidence from the perspective most
16 favorable to the prevailing party.” Id. (internal citations and quotation marks omitted).
17 Instead, if, “having given full respect to the jury’s findings, the judge on the entire evidence
18 is left with the definite and firm conviction that a mistake has been committed,” then the
19 motion should be granted. Id. at 1371-72. However, a motion for new trial should not be
20 granted “simply because the court would have arrived at a different verdict.” Pavao v.
21 Pagay, 307 F.3d 915, 918 (9th Cir. 2002).

22 Erroneous jury instructions or a court’s failure to give adequate instructions may also
23 provide a basis for a new trial. Murphy v. City of Long Beach, 914 F.2d 183, 186-87 (9th
24 Cir. 1990). If a party claims that an erroneous jury instruction was given, the erroneous
25 instruction is not grounds for granting a new trial unless the error affects the essential
26 fairness of the trial and a new trial is necessary to achieve substantial justice. Jazzabi v.
27 Allstate Ins. Co., 278 F.3d 979, 985 n.24 (9th Cir. 2002); see also McDonough Power
28 Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984).

1 The court finds no basis for a new trial. Accordingly, the motion is DENIED. The
2 court is not persuaded that Fresenius presented improper claim construction arguments,
3 nor that the jury's verdict of noninfringement was against the clear weight of the evidence.

4 In addition, for the reasons stated at the hearing, the court finds no attorney
5 misconduct sufficient to warrant a new trial. In the court's view, the trial was hard-fought,
6 and attorneys on both sides were aggressive. As for the "extraneous statements," such
7 statements (on both sides) simply reflected the competitive nature of the relationship
8 between the parties.

10 || IT IS SO ORDERED.

11 || Dated: February 17, 2011

PJH

PHYLLIS J. HAMILTON
United States District Judge